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IN THE

Supreme Court of the United States

October Term, 1965
No. 868

JAMY CORPORATION, a California corporation,

Petitioner,

vs.

ROBERT A. RIDDELL, Individually and as District Director of Internal Revenue, Los Angeles, California,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Citations to Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	10
Appendix A.—Statutes and Regulations	App. p. 1
Appendix B.—Opinion and Judgment below	App. p. 15

TABLE OF AUTHORITIES CITED

Cases	Page
Cohen v. Gross, 63-1 U.S.T.C. par. 9395, 316 F. 2d 521	6, 9

Regulations	
Treasury Regulations, Sec. 301.6871	2
Treasury Regulations, Sec. 301.6873	2

Statutes	
California Corporations Code, Secs. 4650 et seq.	3
Internal Revenue Code, Sec. 6212	4
Internal Revenue Code, Sec. 6213	9
Internal Revenue Code, Sec. 6213(a)	4
Internal Revenue Code, Sec. 6871	3
United States Code, Title 26, (1954), Sec. 6212	2, 4
United States Code, Title 26, (1954), Sec. 6213	2, 9
United States Code, Title 26, (1954), Sec. 6213(a)	2, 4
United States Code, Title 26, (1954), Sec. 6861	2
United States Code, Title 26, (1954), Sec. 6871	2, 3, 7, 8
United States Code, Title 26, (1954), Sec. 6872	2
United States Code, Title 26, (1954), Sec. 6873	2, 7
United States Code, Title 26, (1954), Sec. 7421	2
United States Code, Title 28, Sec. 1254(1)	2

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Jamy Corporation, a corporation organized and existing under the laws of the State of California, as your petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 23, 1964. (Petition for a rehearing was filed on October 23, 1964 and denied on November 5, 1964.)

Citations to Opinions Below.

The memorandum opinion of the District Court is unreported; the opinion of the Court of Appeals affirming the trial Court is reported in 337 F. 2d 11 (1964); [64-2 U.S.T.C. p. 9767.] These opinions and judgments are set forth in Appendix B of this petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 23, 1964. A petition for rehearing was filed in time in the Court of Appeals on October 23, 1964 and was denied on November 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented.

1. Where a District Director, with respect to an asserted deficiency of federal income tax, never issued a deficiency notice pursuant to the provisions of 26 U.S.C. §6212 (1954) but, rather, made an immediate assessment of a deficiency of federal income tax under the provisions of 26 U.S.C. §6871 (1954) (relating to bankruptcies and receiverships) and filed a claim for such asserted deficiency based upon such assessment in the subject receivership proceeding; and where such claim was never presented to, adjudicated by or allowed by, the Receivership Court, is that District Director entitled to collect such asserted deficiency from the taxpayer?

2. If the District Director is not entitled to collect such asserted deficiency, in these circumstances, may he be enjoined from doing so by the taxpayer under the injunctive provisions of 26 U.S.C. §6213(a) (1954)?

Statutes Involved.

The statutes involved are 26 U.S.C., Sections 6212, 6213, 6861, 6871, 6872, 6873 and 7421 (1954). The regulations involved are Regulations, Sections 301.6871 and 301.6873.

Statement.

The jurisdiction of the District Court was invoked in this case in the first instance because the question in this case arises under the Internal Revenue Code, 26 U.S.C. (1954).

This question has been raised in the following manner, as shown by the uncontradicted, verified allegations of the complaint: Petitioner, a solvent California corporation, duly filed federal income tax returns for its fiscal years ending August 31, 1956 and August 31, 1957, in the office of Respondent as District Director of Internal Revenue at Los Angeles, California. The income tax liability assessed to itself in those returns was paid by Petitioner. On April 27, 1959 the two stockholders of Petitioner were then married but were already involved in an action for their divorce. On that date, the wife commenced an action in the Superior Court of the State of California for dissolution of the Petitioner by reason of internal dissension and pursuant to California Corporations Code, Sections 4650 *et seq.* On May 20, 1959 the Court in that action for dissolution appointed a receiver for Petitioner. On November 9, 1959, Respondent, under the authority of the provisions of Section 6871 of the Internal Revenue Code, 26 U.S.C. §6871 (1954) made immediate assessments of asserted income tax deficiencies for the fiscal years of Petitioners ending on August 31, 1956 and August 31, 1957, in the amounts of $4,026.24 and $4,962.08, respectively. On January 22, 1960 Respondent filed in the receivership proceedings a claim, based upon those assessments of asserted deficiencies. This claim was never presented to, adjudicated by or allowed by, the Court in

the receivership proceedings, or otherwise. No steps of any kind were ever taken by the Director to pursue the claim during the pendency of the receivership proceedings. The reason for this failure to prosecute his claim, according to the brief of Respondent (pp. 14, 15) filed in the Court of Appeals, was that the Director had no duty to do any more than file the claim in the receivership proceedings. About three years after their commencement, the receivership proceeding was terminated and the action for dissolution was dismissed by order of the Receivership Court on May 12, 1962. No appeal was ever taken by Respondent in that action. No deficiency letter was ever issued by Respondent to Petitioner pursuant to the provisions of Section 6212 of the Internal Revenue Code, 26 U.S.C. §6212 (1954).

On October 4, 1962, Respondent advised Petitioner, for the first time, that Respondent would attempt to collect the asserted deficiencies based upon the immediate assessments previously made in connection with the terminated receivership proceeding. After several conferences with the Internal Revenue Service, on November 23, 1962, Petitioner commenced the present action under Section 6213(a) of the Internal Revenue Code, 26 U.S.C. §6213(a) (1954) in the United States District Court for the Southern District of California, Central Division, in order to enjoin any such collection or attempted collection on the ground that Respondent had not issued any deficiency letter ("90-day letter") pursuant to Section 6212 of the Internal Revenue Code, 26 U.S.C. §6212 (1954) and that, because the claim filed by Respondent in the receivership proceeding was never allowed, any collection under the authority of the immediate assessments made in connection with the receivership proceeding would be invalid.

As shown by the record on this appeal, the following proceedings have taken place in this case: On November 23, 1962, upon *ex parte* application by Petitioner, the District Court duly issued a temporary restraining order, without notice, upon a cash bond restraining Respondent from collecting or attempting to collect the asserted deficiencies until November 26, 1962. Prior to November 26, 1962 Respondent was duly served with copies of the complaint, summons, motion for temporary restraining order, temporary restraining order, notice of motion for preliminary injunction and memorandum of points and authorities in support of motion for temporary restraining order and motion for preliminary injunction. On November 26, 1962 Petitioner's motion for a preliminary injunction to enjoin Respondent from collecting or attempting to collect the asserted deficiencies was heard by the District Court. After arguments by counsel for Petitioner and Respondent, the District Court ordered that the temporary restraining order was terminated, denied Petitioner's motion for a preliminary injunction and dismissed this action with prejudice. No answer or affidavit or other pleading denying any of the allegations of the complaint was ever filed by Respondent. Proposed findings of fact and conclusions of law and order were served and filed by Respondent on December 6, 1962. On December 11, 1962 objections to the proposed findings of fact and conclusions of law were served and filed by Petitioner. On December 12, 1962 the proposed findings of fact and conclusions of law were signed, without change, by the District Court and its order and judgment based thereon were entered. On January 8, 1963, Petitioner duly filed notice of appeal to the United States Court of Appeals

for the Ninth Court from the order and judgment, together with a cost bond on appeal. On January 11, 1963, the District Court denied Petitioner's motion for an injunction to enjoin Respondent from collecting the asserted deficiencies pending the appeal.

On January 18, 1963, the Court of Appeals, upon *ex parte* application by Petitioner, duly issued a temporary restraining order, without notice, upon a corporate surety bond restraining Respondent from collecting, or attempting to collect, the asserted deficiencies until the determination of a hearing set for February 4, 1963, in the Court of Appeals. On February 4, 1963, based upon a written stipulation filed by Petitioner and Respondent in the Court of Appeals, the Court of Appeals ordered said parties to maintain the *status quo* pending the final determination of the case.

Oral arguments by Petitioner and Respondent were heard by the Court of Appeals on November 13, 1963. On September 23, 1964, the Court of Appeals affirmed the judgment of the District Court citing only the case of *Cohen v. Gross,* 3 Cir. [63-1 U.S.T.C. ¶9395] 316 F. 2d 521, as in support of its decision although expressly stating in its opinion that the case of *Cohen v. Gross* "is not the same as ours". Petitioner's petition for a rehearing was filed on October 23, 1964, in the Court of Appeals within the thirty day period permitted therefor and was denied by that Court on November 5, 1964.

Reasons for Granting the Writ.

1. The question presented is one which has not been settled by this Court. The question presented is of importance in the administration of not only the federal income tax laws but also in the administration of federal bankruptcy laws and state receivership laws.

Congress, in enacting the federal income tax laws, and from time to time, in amending these laws, has endeavored to provide for an orderly procedure for the assessment and collection of federal income tax deficiencies asserted by the Internal Revenue Service. Surely nothing in the federal income tax field could be more fundamental and important than assuring that the Internal Revenue Service not collect from a taxpayer any asserted federal income tax deficiencies which it has no right to collect. The only authority given by Congress to the Internal Revenue Service to collect an asserted deficiency of federal income tax based upon an immediate assessment under 26 U.S.C. §6871 (1954) is contained in 26 U.S.C. 6873 (1954). This section provides *only* for the payment of tax claims which *have been allowed* in a bankruptcy or receivership proceeding. Therefore, in the interest of maintaining an orderly income tax collection procedure, it is of great importance for this Court to decide whether the Internal Revenue Service, even though not authorized by Congress or any regulation, can collect such a claim for taxes which has *not been adjudicated* or *allowed* in the subject bankruptcy or receivership proceeding.

The opinion of the Court of Appeals makes it clear that its decision in this case was in no way based upon the solvent condition of petitioner. Thus, the decision of the Court of Appeals applies alike to all bankruptcy and

receivership proceedings whether or not the subject thereof is solvent or insolvent. It is a rare bankruptcy or receivership proceeding in which a claim for federal income taxes based upon an immediate assessment under 26 U.S.C. §6871 (1954) is not filed. Thus, it is apparent that settlement of the question by this Court is further in the public interest because it is of great importance to the multitude of respective participants in bankruptcy and receivership proceedings, including the many thousands now pending, whether as bankrupts, trustees, receivers, corporations in receivership or as District Directors of Internal Revenue, to know, at the outset of such proceedings, whether or not a District Director who has filed such a claim for income taxes in such proceedings must prosecute his claim to an adjudication *in his favor* before he can collect such an asserted deficiency on the basis of such assessment.

2. The decision of the Court below is believed to be erroneous. The Court of Appeals appears to have predicated its decision denying injunctive relief to Petitioner upon the grounds that "the taxpayer fails in seeking equity by presenting no inequitable situation", and "we simply cannot agree that it (Petitioner) has found a loophole in the tax laws . . .".

This reasoning of the Court below overlooks the real issue in this case which is whether or not the District Director is entitled to collect a tax where there is no statutory authority for such collection. The District Director has not complied with the statutory provisions regulating collections under the type of immediate assessment made here.

The question in this case is whether the Director never having issued a "90-day letter", has brought

himself within one of the two exceptions to the prohibitive provisions of 26 U.S.C. §6213 (1954). One such exception would permit the collection of an asserted deficiency of federal income taxes under a jeopardy assessment where no 90-day letter was ever issued. No jeopardy assessment, however, was made or is involved in this case. The other such exception would permit the collection of the asserted deficiency if the claim filed in the receivership proceeding had been adjudicated and allowed. The claim which was filed in the receivership proceeding was *never adjudicated* or *allowed*. Therefore, the Respondent is not within either of the two statutory exceptions to 26 U.S.C. §6213 (1954), and, not having issued any 90-day letter, is not entitled to collect any tax here and should be enjoined under the provisions of 26 U.S.C. 6213 (1954), from attempting to collect the asserted deficiency.

The availability to a taxpayer of the injunctive relief afforded by this section is not conditioned upon any showing of equity or inequity. The Respondent, having no statutory authority for the collection of any tax, properly should be enjoined from doing so, all in accordance with the statutory pattern of section 6213 of the Internal Revenue Code, 26 U.S.C. §6213 (1954).

The only authority which the Court below cited in support of its decision, *Cohen v. Gross*, 3 Cir. [63-1 U.S.T.C. ¶9395], 316 F. 2d 521, is not applicable to the question in this case because in that case the claim for additional taxes which was filed in the bankruptcy proceedings was *adjudicated* and *was allowed* in favor of the District Director.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

26. U.S.C. § 6212. (1954) NOTICE OF DEFICIENCY.

(a) In General. — If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for Notice of Deficiency.—

(1) Income and Gift Taxes. — In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A or chapter 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(2) Joint Income Tax Return. — In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

(3) Estate Tax — In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a defi-

ciency in respect of a tax imposed by chapter 11, if addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

(c) Further Deficiency Letters Restricted.—

(1) General Rule. — If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical errors) or in section 6861(c) (relating to the making of jeopardy assessments).

(2) Cross References. —

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of —

(A) Deficiency attributable to change of election with respect to the standard deduction where taxpayer and his spouse made separate returns, see section 144(b).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(3)(C) and (D).

(C) Deficiency attributable to gain on sale or exchange of personal residence, see section 1034(j).

(D) Deficiency attributable to war loss recoveries where prior benefit rule is elected, see section 1335.

26 U.S.C. § 6213. (1954) RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) Time for Filing Petition and Restriction on Assessment. — Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided

(c) Cross References. —

(1) For assessment as if a mathematical error on the return, in the case of erroneous claims for income tax prepayment credits, see section 6201(a)(3).

(2) For assessments without regard to restrictions imposed by this section in the case of—

(A) Recovery of foreign income taxes see section 950(c).

(B) Recovery of foreign estate tax, see section 2016.

26 U.S.C. § 6861. (1954) JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) Authority for Making. — If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) Deficiency Letters. — If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

(c) Amount Assessable Before Decision of Tax Court. — The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212(c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Secretary or his delegate may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Secretary or his delegate shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently

filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

(d) Amount Assessable After Decision of Tax Court. — If the jeopardy assessment is made after the decision of the Tax Court is rendered, such assessment may be made only in respect of the deficiency determined by the Tax Court in its decision.

(e) Expiration of Right to Assess. — A jeopardy assessment may not be made after the decision of the Tax Court has become final or after the taxpayer has filed a petition for review of the decision of the Tax Court.

(f) Collection of Unpaid Amounts. — When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by bond as provided in section 6863(b) shall be collected as part of the tax upon notice and demand from the Secretary or his delegate, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the Secretary or his delegate.

(g) Abatement if Jeopardy Does Not Exist. — The Secretary of his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

(h) Cross References. —

(1) For the effect of the furnishing of security for payment, see section 6863.

(2) For provision permitting immediate levy in case of jeopardy, see section 6331 (a).

26 U.S.C. § 6871. (1954) CLAIMS FOR INCOME, ESTATE, AND GIFT TAXES IN BANKRUPTCY AND RECEIVERSHIP PROCEEDINGS.

(a) Immediate Assessment. — Upon the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency

(together with all interest, additional amounts, or additions to the tax provided by law) determined by the Secretary or his delegate in respect of a tax imposed by subtitle A or B upon such taxpayer shall, despite the restrictions imposed by section 6213(a) upon assessments, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law.

(b) Claim Filed Despite Pendency of Tax Court Proceedings. In the case of a tax imposed by subtitle A or B claims for the deficiency and such interest, additional amounts, and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver.

26 U.S.C. § 6872 (1954) SUSPENSION OF PERIOD ON ASSESSMENT.

If the regulations issued pursuant to section 6036 require the giving of notice by any fiduciary in any proceeding under the Bankruptcy Act, or by a receiver in any other court proceeding, to the Secretary or his delegate of his qualification as such, the running of the period of limitations on the making of assessments shall be suspended for the period from the date of the

institution of the proceeding to a date 30 days after the date upon which the notice from the receiver or other fiduciary is received by the Secretary or his delegate; but the suspension under this sentence shall in no case be for a period in excess of 2 years.

26 U.S.C. § 6873. (1954) UNPAID CLAIMS.

(a) General Rule. — Any portion of a claim for taxes allowed in a receivership proceeding or any proceeding under the Bankruptcy Act which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding.

(b) Cross References. —

(1) For suspension of running of period of limitations on collection, see section 6503 (b).

(2) For extension of time for payment, see section 6161 (3).

26 U.S.C. § 7421. (1954) PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) Tax. — Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) Liability of Transferee or Fiduciary. — No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of —

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

Treas. Reg § 301.6871(a)-1. (1957) (As amended by T. D. 6425, 11/10/59, to reflect P. L. 85-866, and by T. D. 6498, 10/24/60.) Immediate assessment of claims for income, estate, and gift taxes in bankruptcy and receivership proceedings. — (a) Upon (1) the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, (2) the filing with a court of competent jurisdiction or (where approval is required by the Bankruptcy Act, 11 U.S.C. chs. 1-14) the approval of a petition of, or the approval of a petition against, any taxpayer in any other proceeding under the Bankruptcy Act, or (3) the appointment of any receiver for any taxpayer in a receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, the district director shall immediately assess any deficiency of income, estate, or gift tax (together with all interest, additional amounts, or additions to the tax provided by law), determined by him, if such deficiency has not heretofore been assessed in accordance with law. Such assessment shall be made immediately, whether or not a notice of deficiency has been issued, and without regard to the restrictions upon assessments under section 6213.

(b) As used in this section and §§ 301.6871(a)-2 to 301.6873-1, inclusive, the term "proceeding under the Bankurptcy Act" includes a proceeding under chapters I to VII, inclusive, of the Bankruptcy Act, or under section 75 or 77 (11 U.S.C. 203, 205), or chapters X to XIII, inclusive, of such Act, or any other proceeding under the Act.

Treas. Reg. § 301.6871(a)-2. (1957) (As amended clerically by T.D. 6498, 10/24/60.) Collection of assessed taxes in bankruptcy and receivership proceedings. — (a) During a proceeding under the Bankruptcy Act (11 U.S.C. chs. 1-14) or a receivership proceeding in either a Federal or State court, generally the assests of the taxpayer are under the control of the court in which such proceeding is pending, and the collection of taxes cannot be made by levying upon such assets. However, any assets which under applicable provisions of law are not under the control of the court may be subject to levy. See paragraph (b) of this section and §301.6871(b)-1 with respect to claims for such taxes. See section 6873 with respect to collection of unpaid claims.

(b) District directors should, promptly after ascertaining the existence of any outstanding liability against a taxpayer in any proceeding under the Bankruptcy Act or in any receivership proceeding, and in any event within the time limited by the appropriate provisions of the Bankruptcy Act, or by the appropriate orders of the court in which such proceeding is pending, file proof of claim covering such liability in the court in which such proceeding is pending. Such proof of claim should be filed whether the unpaid taxes involved have been assessed or not, except in cases where the instructions of the Commissioner direct otherwise; for example, where the payment of the taxes is secured by a sufficient bond. At the same time proof of claim is filed with the bankruptcy or receivership court, the district director will send notice and demand for payment to the taxpayer, together with a copy of such proof of claim.

(c) Under sections 3466 and 3467 of the Revised Statutes (31 U.S.C. 191, 192) and section 64 of the Bankruptcy Act, 11 U.S.C. 104, taxes are entitled to the priority over other claims therein specified, and the trustee, receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which the proceeding under the Bankruptcy Act or receivership proceeding is pending, may be held personally liable for failure on his part to protect the priority of the Government respecting taxes of which he has notice. Sections 75(1), 77(e), 199, 337(2), 455, and 659(6) of the Bankruptcy Act (11 U.S.C. 203(1), 205(e), 599, 737(2), 855, and 1059(6)) also contain provisions with respect to the rights of the United States relative to priority of payment. For the filing of returns by a trustee in bankruptcy or by a receiver, see section 6012(b)(3) and 28 U.S.C. 960. Bankruptcy courts have jurisdiction under the Bankruptcy Act to determine all disputes regarding the amount and validity of taxes claimed in a proceeding under the Bankruptcy Act. A proceeding under the Bankruptcy Act or receivership proceeding does not discharge any portion of a claim of the United States for taxes except in the case of a proceeding under section 77 or chapter X of the Bankruptcy Act. However, the claim may be settled or compromised as in other cases in court.

(d) For the requirement that a receiver, trustee in bankruptcy, or other like fiduciary give notice as to his qualification as such, see section 6036 and the regulations thereunder.

Treas. Reg § 301.6871(b)-1. (1957) (As amended by T.D. 6425, 11/10/59, to reflect P.L. 85-866, and by T.D. 6498, 10/24/60.) Claims for income, estate, and

gift taxes in proceedings under the Bankruptcy Act and receivership proceedings; claim filed despite pendency of Tax Court proceedings. — (a) If it is determined that a deficiency is due in respect of income, estate, or gift tax and the taxpayer has filed a petition with the Tax Court before (1) the adjudication of bankruptcy in any liquidating proceeding, (2) the filing with a court of competent jurisdiction or (where approval is required by the Bankruptcy Act (11 U.S.C. chs. 1-14)) the approval of a petition of, or the approval of a petition against, any taxpayer in any other proceeding under the Bankruptcy Act, or (3) the appointment of a rece 'er, the trustee, receiver, debtor in possession, or other like fiduciary, may, upon his own motion, be made a party to the Tax Court proceeding and thereafter may prosecute the appeal before the Tax Court as to that particular determination. No petition shall be filed with the Tax Court for a redetermination of the deficiency after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver.

(b) Even though the determination of a deficiency is pending before the Tax Court for redetermination, proof of claim for the amount of such deficiency may be filed with the court in which the proceeding under the Bankruptcy Act or receivership proceeding is pending without awaiting final decision of the Tax Court. In case of a final decision of the Tax Court before the payment or the disallowance of the claim in the proceeding under the Bankruptcy Act or receivership proceeding, a copy of the Tax Court's decision may be filed by

the district director with the court in which such proceeding is pending.

(c) While a district director is required by section 6871(a) and paragraph (a) of § 301.6871(a)-1 to make immediate assessment of any deficiency, such assessment is not made as a jeopardy assessment within the meaning of section 6861, and consequently the provisions of that section do not apply to any assessment made under section 6871. Therefore, the notice of deficiency provided in section 6861(b) will not be mailed. Although such notice will not be issued, a letter will be sent to the taxpayer or to the trustee, receiver, debtor in possession, or other like fiduciary, notifying him in detail how the deficiency was computed, that he may furnish evidence showing wherein the deficiency is incorrect, and that upon request he will be granted a conference by the district director with respect to such deficiency. However, such letter will not provide for such a conference where a petition was filed with the Tax Court before (1) the adjudication of bankruptcy in a liquidating proceeding, (2) the filing with a court of competent jurisdiction or (where approval is required by the Bankruptcy Act), the approval of a petition of, or the approval of a petition against, any taxpayer in any other proceeding under the Bankruptcy Act, or (3) the appointment of a receiver.

Treas. Reg. § 301.6873-1. (1957) Unpaid claims in bankruptcy or receivership proceedings. — (a) If any portion of the claim allowed by the court in a receivership proceeding, or in any proceeding under the Bankruptcy Act (11 U. S. C. chs. 1-14), remains unpaid after the termination of such proceeding, the district director will send notice and demand for payment thereof to the

taxpayer. Such unpaid portion with interest as provided in section 6601 may be collected from the taxpayer by levy or proceeding in court within the period of limitation for collection after assessment. For the general rule as to such period of limitation, see section 6502, and for suspensions of the running of the period provided in section 6502, see, for example, section 6503. For suspensions under other provisions of law, see, for example, section 11f of the Bankruptcy Act (11 U. S. C. 29(f)). Extension of time for the payment of such unpaid amount may be granted in the same manner and subject to the same provisions and limitations as provided in section 6161(c).

(b) Section 6873 is applicable only where a claim for taxes is allowed in a receivership proceeding or in a proceeding under the Bankruptcy Act. Claims for taxes, interest, additional amounts, or additions to the tax may be collectible in equity or under other provisions of law although no claim was allowed in the proceeding because, for example, such items were not included in a proof of claim filed in the proceeding or no proof of claim was filed. Except in the case of a proceeding under section 77 or chapter X of the Bankruptcy Act, a tax or a liability in respect thereof is not discharged by a proceeding under such Act, whether or not a claim is filed in such proceeding, and provisions suspending the running of the period of limitation on the collection of taxes are applicable, whether or not a claim is filed in such proceeding.

APPENDIX B.

Findings of Fact, Conclusions of Law and Judgment.

United States District Court for the Southern District of California, Central Division.

Jamy Corporation, a California Corporation, Plaintiff, v. Robert A. Riddell, individually and as District Director of Internal Revenue, Los Angeles, California, Defendant. No. 62-1541 HW Civil.

The above matter having come on for hearing before this Court on plaintiff's motion for preliminary injunction to enjoin collection of assessments made under Section 6871, Internal Revenue Code of 1954, this Court having duly considered the matter, now makes its findings of fact, conclusions of law, and enters its order as follows:

FINDINGS OF FACT

1. On or about April 27, 1959 an action was commenced in the Superior Court of the State of California in and for the County of Los Angeles, for a dissolution of the plaintiff. On or about May 20, 1959, the said Court appointed a receiver in said action.

2. On November 9, 1959, defendant, District Director of Internal Revenue, Los Angeles, California, pursuant to Section 6871, Internal Revenue Code of 1954, made an assessment against plaintiff for deficiencies in Federal Income tax for the fiscal years ending August 31, 1956 and August 31, 1957, in the respective amounts of $4,026.24 and $4,962.08.

3. On or about January 22, 1960, defendant filed a "Claim of United States for Internal Revenue Taxes" in the said state court receivership proceeding. The claim

was not paid and the receivership was terminated on or about May 2, 1962.

4. On November 23, 1962, plaintiff obtained a temporary restraining order restraining collection of assessments made by defendant, and on the same date filed the instant injunction action.

CONCLUSIONS OF LAW

1. The District Director of Internal Revenue at Los Angeles, California, made valid assessments against plaintiff for deficiency income taxes for the fiscal years ending August 31, 1956 and August 31, 1957.

2. The plaintiff is prohibited by Section 7421, Internal Revenue Code of 1954, from instituting suit to restrain collection of any tax.

3. This Court has no jurisdiction of the subject matter of this action.

ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It is Hereby Ordered and Decreed as follows:

1. The temporary restraining order restraining collection of assessments is hereby terminated.

2. The motion for preliminary injunction to enjoin collection of assessments is denied.

3. The action under Section 6213, Internal Revenue Code of 1954, to restrain and enjoin collection of assessments is dismissed with prejudice.

Dated: December 12, 1962.

/s/ Harry C. Westover
United States District Judge

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Jamy Corporation, a California corporation, *Appellant,* vs. Robert A. Riddell, individually and as District Director of Internal Revenue, Los Angeles, California, *Appellee.* No. 18,398. [Sept. 23, 1964].

On Appeal from the United States District Court for the Southern District of California, Central Division

Before: Chambers and Hamley, Circuit Judges, and Jameson, District Judge.

Chambers, Circuit Judge:

The district court has denied appellant a decree enjoining collection of income taxes claimed by the appellee-defendant for two fiscal years ending in 1956 and 1957. We affirm.

The judgment below resulted from an attack on plaintiff's complaint. Again, we are confronted with the paradoxical situation that the rules for the Southern District of California provide for findings of fact and conclusions of law on summary judgments when the very essence of a summary judgment is that there are no facts in dispute. Such an adherence to form perhaps does no harm when it is used as a checklist. And it did no harm here, although all too often such findings of fact are telltale that there really was a genuine disputed issue of fact.

The peculiar facts of this case arise out of the marital breakup of the California marital community of Amy S. McKinnon and James A. McKinnon, each of whom owned fifty per cent of the stock of Jamy. In July,

1956, Mrs. McKinnon filed an action in California for a divorce. Later in April, 1959, Mrs. McKinnon filed a petition in a California state court for dissolution of the corporation on the ground that the dissidence of the two equal stockholders made it a deadlocked corporation. (Such a ground is a recognized one for dissolution in California.)

As a part of the same dissolution proceedings, a receiver was appointed by the state court on May 20, 1959. Thereafter, in November, 1959, the appellee caused two assessments, one for 1956 and the other for 1957, to be made against the corporation. This was done pursuant to Section 6871 of the Internal Revenue Code of 1954. Written notice thereof was given promptly to the receiver. Thereafter, on January 22, 1960, appellee filed a "claim of United States for Internal Revenue Tax" in the receivership proceedings. Thus, he submitted himself to the receivership. Whether the claim was valid was never adjudicated in the state proceedings. The receiver does appear to have tacitly recognized the claim as valid. However, our decision is not grounded on this fact.

As abruptly as the receivership started, it came to an end. The corporation was not dissolved. The husband and wife adjusted their business differences, filed a stipulation for termination of the receivership, and the assets of the corporation were returned to it. In a way, in the vernacular, the receiver was left "high and dry." Freed of the taxpayer's insulation in the form of the

collect his old assessments. The taxpayer rushed to receivership, the director began to start to make ready to federal district court seeking an injunction.

Because of the urgencies of the government fisc, it is rare that one can enjoin the taxgatherer from collecting what he claims. 26 U.S.C §7421. Normally, the classic example of where one may enjoin the federal tax collector is where he has failed to issue his 90 (sometimes 150) day notice of deficiency. 26 U.S.C. §6212, §6213. Popularly, such notices are called a ticket to the tax court — used to review the collector when one prefers to avoid payment and suit to recover, or perhaps just prefers the tax court.

But the Internal Revenue Code has some different provisions if a bankruptcy or receivership comes astride of the tax claim. We see in 26 U.S.C. §6871 (as amended by Section 88, P.L. 85-866) that when such a status has arisen the director may make his assessment. Then the bankruptcy court or receivership court may adjudicate the claim. It is true that the section does not spell out very much about adjudication. But we hold that either party had a right to get the tax claim adjudicated in the court of the receivership. But the receiver, who during the receivership was in all practical sense the corporation, took no steps to contest the tax. Certainly there was available in the receivership a review not under more favorable circumstances than in the tax court.

We suggest that if all but bankrupts and those in receivership were permitted to contest their taxes without prepayment, serious problems would be presented in the constitutional field of equal protection. Thus, we are justified in using all intendments on Section 6871 to give the corporation in the receivership court a tax court type of review.[1] The case of Cohen v. Gross, 3 Cir., 316 F.2d 521, is not the same as ours, but its logic clearly indicates that we should hold as we do here.

With our determination that the corporation was entitled to a review in the receivership court, and the receivership being terminated by the corporation acting through its sole stockholders, they thus deprived their corporation of any opportunity of review before payment.[2]

Thus we say that the taxpayer fails in seeking equity by presenting no inequitable situation. Our decision has not been influenced by the fact that this apparently abundantly solvent taxpayer probably still has open to it the process of payment and suit to recover back. We simply cannot agree that it has found a loophole in the tax laws.[3]

The judgment is affirmed.

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[1]While the language of 26 U.S.C. §6871(b) is crystal clear that the director may get the tax adjudicated in the receiver's court, we think the same privilege must be read into the section for the benefit of the taxpayer.

[2]Plaintiff's complaint herein shows that the receivership was not held open to settle the tax claim. We suggest it could have been kept open for that purpose.

[3]It should be noted that even under jeopardy assessments review is permitted in the tax court if a bankruptcy or receivership does not intervene. If these things happen, the case can then go to the court supervising the trust res. See Cohn v. Gross, cited infra, and Ross v. Commissioner, 38 T.C. 309.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Jamy Corporation, a California corporation, Appellant vs. Robert A. Riddell, individually and as District Director of Internal Revenue, Los Angeles, California, Appellee, No. 18,398.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 23, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 868

JAMY CORPORATION, PETITIONER

v.

ROBERT A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. Its findings of fact, conclusions of law, and order (Pet. App. 15–16) are unreported. The opinion of the court of appeals (Pet. App. 17–20) is reported at 337 F. 2d 11.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on September 23, 1964. A timely petition for rehearing was denied on November 5, 1964. (R. 93.)[1] The petition for a writ of certiorari

[1] "R." references are to Volume One of the record on appeal.

was filed on February 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 6871 of the Internal Revenue Code of 1954 authorizes the assessment and collection of income taxes without the prior issuance of a deficiency notice, where the taxes were assessed while the taxpayer was in receivership.

STATUTES AND REGULATIONS INVOLVED

Sections 6212(a), 6213(a), 6871, 6873(a), 7421(a) of the 1954 Code, and Sections 301.6871(a)–1 and 2, and 301.6873–1 of the Treasury Regulations on Procedure and Administration (1954 Code) are set forth in the Appendix to the petition.

STATEMENT

The taxpayer filed federal income tax returns for its fiscal years 1956 and 1957 and paid the tax shown to be due. (R. 3.) At the time, Amy S. McKinnon and James A. McKinnon, each of whom owned 50% of the stock in the taxpayer-corporation, were husband and wife but they had separated and were engaged in divorce proceedings. (R. 3.) In 1959, the wife instituted an action in the California Superior Court for dissolution of the taxpayer-corporation on the ground that the dissidence of the two equal stockholders made it impossible properly to conduct the corporate business. A receiver was appointed. (R. 3; Pet. App. 15.) Thereafter, the District Director, acting pursuant to the provisions of

Section 6871 of the 1954 Code, made deficiency assessments against the taxpayer-corporation for the fiscal years 1956 and 1957 in the respective amounts of $4,026.24 and $4,962.08 and sent written notice thereof to the receiver. (R. 3–4, 10–12, 89; Pet. App. 15.) Subsequently, on January 22, 1960, the District Director filed a claim for these taxes in the State court receivership. The validity of this claim was never adjudicated in that proceeding, although the receiver appears to have tacitly recognized its validity. (R. 5, 89.)

The receivership was not completed and the corporation was not dissolved. The husband and wife adjusted their business differences, filed a stipulation for termination of the receivership, which was approved on May 2, 1962, and the assets of the corporation were returned to it. (R. 5, 89.)

Subsequently, the District Director advised the taxpayer that he intended to enforce the tax assessments made while the corporation was in receivership, and in October and November, 1962, made demand for payment of the taxes assessed. (R. 6–7, 14, 89.) Thereupon, the taxpayer-corporation filed a complaint for an injunction to restrain the Director from enforcing collection of the taxes. (R. 2–9, 89.)

The district court concluded that the assessments were valid, dismissed the complaint for lack of jurisdiction, and denied taxpayer's motion for an injunction *pendente lite*. (R. 47.) The Court of Appeals affirmed. (R. 92.)

ARGUMENT

The decision of the court below is correct. There is no conflict of decisions and no reason warranting review by this Court.

The asserted basis of the injunction suit is that since the claim for taxes was not approved and allowed in the receivership, the taxes may not be collected through distraint without first issing a deficiency notice, as provided in Sections 6212(a) and 6213(a) of the 1954 Code (R. 5–6). The contention is without merit.

Section 6871, pursuant to which the income taxes here involved were assessed, provides that where a receivership proceeding is instituted in any federal or State court and a receiver appointed, any deficiency in tax determined to be due "shall * * * be immediately assessed," "despite the restrictions imposed by Section 6213(a)." See also Section 301.6871(a)–1(a), Treasury Regulations on Procedure and Administration. Thereafter, as Section 6871(b) provides, no petition for redetermination of the deficiency may be filed with the Tax Court. See also Section 301.6871(a)–2(c) of the Treasury Regulations; H. Rep. No. 704, 73d Cong., 2d Sess., p. 34.

A claim for the deficiency in tax assessed may be presented for adjudication to the receivership court.[2]

[2] At the time proof of claim is filed with a bankruptcy or receivership court, the District Director is required to send notice and demand for payment to the taxpayer, together with a copy of such proof of claim. Treasury Regulations, Section 301.6871(a)–2(b).

See *Abel* v. *Campbell*, 334 F. 2d 339 (C.A. 5th); *Cohen* v. *Gross*, 316 F. 2d 521 (C.A. 3d). If the claim is "allowed," Sec. 6873 becomes applicable to require the taxpayer to pay any portion of the tax which was not collected from the receivership assets. Alternatively, if the government is willing to forego an attempt to collect its claim from the assets held by the bankruptcy or receivership court, it may simply collect on the assessment, using the ordinary equitable and legal remedies which are made available to it by statute. See Section 6331 and Section 301.6873-1(b); cf. *Bruning* v. *United States*, 376 U.S. 358, 360–361.

Clearly the situation here involved, where adjudication and allowance of the tax claim in the receivership proceeding was thwarted by taxpayer's own action in causing the proceeding to be terminated, presents a particularly appropriate occasion for the latter approach of collecting on the assessment by enforcement of the lien by suit or by distraint proceedings. See *Kornberg* v. *Tomlinson*, 225 F. Supp. 70 (S.D. Fla.), affirmed *per curiam* on February 18, 1965 (C.A. 5th, No. 21485).

Finally, it is worth noting that injunctive relief is unwarranted here as a matter of equity alone, for the taxpayer has an adequate remedy at law. It can pay the tax, file a refund claim and sue for recovery if the claim is denied. That it is in a position to do so is apparent from its allegations (R. 7, 8) that it has "ample cash" and is "financially solvent."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1965.